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## ON WHAT DISTINGUISHES NEW ORIGINALISM FROM OLD: A JURISPRUDENTIAL TAKE

Mitchell N. Berman\* & Kevin Toh\*\*

“What [I] value[] is the Way, which goes beyond technique. When I first began cutting up oxen, I did not see anything but oxen. Three years later, I couldn’t see the whole ox. And now, I encounter them with spirit and don’t look with my eyes. Sensible knowledge stops and spiritual desires proceed. I rely on the Heavenly patterns, strike in the big gaps, am guided by the large fissures, and follow what is inherently so. I never touch a ligament or tendon, much less do any heavy wrenching!”<sup>1</sup>

Butcher Ding in the *Zhuangzi*

### INTRODUCTION

What is new originalism? In the influential article that popularized the term,<sup>2</sup> Keith Whittington identified several features that, according to him, principally distinguish new originalism from old. First, he observed, new originalists maintain that the proper target of originalist interpretation is the original public meaning of the constitutional text, as opposed to the Framers’ or ratifiers’ intentions or expectations.<sup>3</sup> Second, new originalism is more concerned with the positive task of providing the basis of constitutional doctrines than with the negative task of subverting doctrines that allegedly were products of judicial excesses.<sup>4</sup> Third, new originalism is less motivated by a commitment to judicial restraint, than by a concern to identify “what judges are supposed to be interpreting and what that implies.”<sup>5</sup>

We believe that the third distinguishing feature (or something very close to it) is the nub of the matter. It is the feature that amounts to “the center of

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\*\* Associate Professor of Philosophy, San Francisco State University. We are grateful to the organizers, Saul Cornell, Abner Greene, and Ben Zipursky, for inviting us to participate in this Symposium, to fellow symposiasts and audience members for productive reactions to an early draft, and to Mark Greenberg for very helpful written comments.

1. J. David Velleman, *The Way of the Wonton*, in PRACTICAL IDENTITY AND NARRATIVE AGENCY 169, 183 (Kim Atkins & Catriona Mackenzie eds., 2008) (quoting *Zhuangzi*, in READINGS IN CLASSICAL CHINESE PHILOSOPHY 219–20 (Philip J. Ivanhoe & Bryan W. van Norden eds., 2001)).

2. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y. 599 (2004).

3. *Id.* at 609.

4. *Id.* at 608.

5. *Id.* at 609.

gravity,” if you will, of new originalism, and likely explains the other distinguishing features of that position, including the other two that Whittington enumerates.<sup>6</sup> In a nutshell, old originalism was (chiefly) a theory of adjudication, whereas new originalism is (chiefly) a theory of law. Or so we will contend. This Article is devoted to characterizing that distinction, defending our characterization, and explaining its importance. Along the way, we comment on what appears to be an important but as yet little noticed intramural disagreement within the new originalist camp. Simply put, Whittington and Larry Solum differ regarding what interpretation aims at, and thus what originalism, and more specifically what new originalism, is. For the reasons that we shall enumerate, we side with Whittington’s position, or at least a reconstructed version of it, against Solum’s. We end the Article with some admittedly tentative thoughts regarding the formidable theoretical obstacles that confront originalist theories of constitutional law.

### I. DEFINING TERMS

Pretheoretically, originalism is a theory, or family of theories, concerning constitutional interpretation. This is true enough, we think, but not yet terribly helpful, for the phrase “constitutional interpretation” is notoriously equivocal. As Richard Posner has noted, “[I]nterpretation is a portmanteau word so capacious that virtually nothing that a court might ‘do’ to or with a [text] could not be thought interpretation in a semantically permissible, indeed orthodox, sense.”<sup>7</sup> So we start with some conceptual distinctions and terminological tidyings-up.

#### A. *Interpretation, Adjudication, Law*

In a well-known 1997 article, Gary Lawson took pains to subdivide the broad and undifferentiated terrain of theories of constitutional interpretation into theories of interpretation proper and theories of adjudication.<sup>8</sup> For Lawson, “[t]heories of interpretation concern the meaning of the Constitution,” whereas “[t]heories of adjudication concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes.”<sup>9</sup> Theories of each type, he added, can be either descriptive or normative. And “at the normative level,” he continued, “a theory of interpretation allows us to determine what the Constitution truly

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6. That seems to be the case at least from the theoretical perspective. From a practitioner’s perspective, the most significant difference between old and new originalism could be the first. But as said in the text, it is our conjecture that other differences, including Whittington’s first, are ultimately traceable to the third difference that we will be highlighting.

7. Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989); see also, e.g., Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 269–70 (Jules Coleman & Scott Shapiro eds., 2002).

8. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

9. *Id.* at 1823.

means, while a theory of adjudication allows us to determine what role, if any, the Constitution's meaning should play in particular decisions."<sup>10</sup>

This is a helpful distinction. But we believe that two additional refinements are necessary to reap the full benefits of the move that Lawson has made. First, Lawson's talk about "the meaning of the Constitution" when discussing theories of interpretation is ambiguous. The "meaning" at which interpretation supposedly aims could be understood as either what could be called "semantic meaning," or what could be called "legal meaning," or perhaps both at once. In other words, the relevant sense of "meaning" could refer to the meanings of the inscriptions in the constitutional text, or to the law—i.e. the legal requirements, permissions, and prohibitions—that the Constitution imposes, or both of these things. Let us further explain.

The relevant ambiguity, far from being unique to Lawson, is close to ubiquitous in originalist writing.<sup>11</sup> Originalists assume or take for granted—sometimes explicitly, but much more often implicitly in varying degrees—that the law that the Constitution imposes is equivalent to the semantic contents of the inscriptions in the constitutional text, and, consequently, that discerning the semantic contents of the constitutional text is equivalent to discovering the constitutional law. To take just one example, Whittington contends, "An interpretation of a text attempts to capture the true meaning of the text."<sup>12</sup> But as Solum, an originalist, has recently perceptively observed, "It is at least conceivable that the meaning of the constitutional text and the content of the rules of constitutional law are not identical."<sup>13</sup> In other words, to equate the two is to take a *substantive* position.

Lest there be any doubt, the substantive position here may be correct. (We believe that it isn't, but we are not now assuming its incorrectness or saying anything that should stack the deck against this particular substantive position.) What we point out, along with Solum, and further emphasize, is that it is something that needs to be substantiated and defended, and not something that can be taken for granted.<sup>14</sup> If the

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10. *Id.* at 1824.

11. And in nonoriginalist writing too. One of us (Berman) pleads guilty to perpetuating this ambiguity in his own published work. Among commentators, Mark Greenberg has been, perhaps, the most insistent and perceptive critic of the tendency of legal theorists to ignore the transition from semantic content to legal content. *See, e.g.,* Mark Greenberg, *Legislation As Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Greenberg, *Legislation As Communication?*]; Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUD. PHIL. L. 39 (2011); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004) [hereinafter Greenberg, *How Facts Make Law*].

12. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 121 (2010).

13. Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 953 (2009).

14. Although we agree with Solum in noticing and highlighting the gap between semantic meaning and legal meaning, as we will discuss later in this Article, we disagree

substantive position were right, and if the constitutional law of the United States were, therefore, actually equivalent to the semantic meanings of the inscriptions in the constitutional text, then the perspicuous thing to say, in our view, would be that constitutional interpretation does attempt to discover the Constitution's semantic meaning, and by way of the semantic meaning also its legal meaning, only because the text's semantic meaning *is* its legal meaning—i.e., that the semantic meaning constitutes the law.<sup>15</sup>

As we read him,<sup>16</sup> Lawson is best understood as suggesting that normative theories of constitutional interpretation are in fact theories concerning the Constitution's legal content, meaning, or significance. Consider, for instance, his insistence that “[o]ne must first determine, through interpretation, what the Constitution means,” and that only afterwards “can one determine whether the properly interpreted Constitution generates any *political* obligations.”<sup>17</sup> Why is the second question whether the properly interpreted Constitution generates *political* obligations rather than *legal* obligations? Precisely, we aver, because discovering what *legal* obligations the Constitution generates is the job handled by constitutional interpretation.

A plausible case could be made that Whittington (at least some of the time) also conceives constitutional interpretation as an activity that aims at “legal meaning,” or the law. “Interpretation[,]” he says, “attempts to divine

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with his way of conceiving the nature of constitutional interpretation in light of that gap. See *infra* Part III.B.

15. In fact, there is at least one further distinction to be made within the phenomena that we refer to indiscriminately in the text as “semantic meaning.” As philosophers of language and linguists have observed over the years, there is a distinction between the meanings of sentences on the one hand, and what speakers communicate partly by way of those sentences on the other. What a speaker communicates or conveys to his audience is not merely a function of the meanings of the sentences he uses, but also of the various contextual factors and various principles of language usage that he and his audience exploit together. Examples of such “pragmatic enrichment” are easy to find. When a speaker asks a friend, after picking him up at the airport, “Have you eaten?” the speaker is clearly not asking him whether he has ever engaged in the activity of consuming food, but whether he has eaten in the last few hours or whether he is hungry now. See Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in 1 PHILOSOPHICAL ESSAYS 403 (2009) [hereinafter Soames, *Interpreting Legal Texts*]; Scott Soames, *The Gap Between Meaning and Assertion: Why What We Literally Say Often Differs from What Our Words Literally Mean*, in 1 PHILOSOPHICAL ESSAYS, *supra*, at 278.

In the text, we ignore this distinction between semantic content proper and linguistically based communicative content, for this distinction does not make a difference for the points we are interested in making. We are more concerned with the difference between either kind of linguistic content on the one hand and legal content on the other. Unfortunately in our view, Soames ignores this latter distinction while highlighting the former when he says: “Since *the content of the law* includes everything asserted and conveyed in adopting the relevant legal texts, meaning is sometimes merely a guide to interpretation, to be supplemented by other things.” Soames, *Interpreting Legal Texts*, *supra*, at 408–09.

16. Conversations with Lawson suggest that this may not be precisely how *he* reads Lawson. But because we are uncertain that we fully grasp his account of the relationship between semantic content and law, because he has allowed to us that his views on that question are idiosyncratic, and because the claims we most wish to make do not require it, we will stop short of a deeper foray into Lawson exegesis.

17. Lawson, *supra* note 8, at 1823 (emphasis added).

the meaning of the text.”<sup>18</sup> So far, we might suspect that he is taking for granted the equivalence of semantic meaning and legal meaning in a way that we deem question begging. But he continues as follows:

There will be occasions, however, when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction. The process of interpretation may be able to constrain the available readings of the text and limit the permissible set of political options, but the interpreter may not be able to say that the text demands a specific result.<sup>19</sup>

Because any “question” that arises during the course of constitutional adjudication would be a *legal* question, and because whatever “demands” the text would impose would be *legal* demands, this passage makes sense only on the assumption that Whittington implicitly acknowledges that interpretation sometimes fails to deliver “determinate [legal] answer[s],” and that it does not always specify with precision what “the text [legally] demands.” Consider too Whittington’s speculations, for purposes of argument, “that, properly interpreted, the First Amendment does not protect seditious libel, the Second Amendment does not protect individual gun ownership, that the Eighth Amendment does not prohibit execution by firing squad, or that the Thirteenth Amendment does not apply to ‘wage slavery’ and require rights of collective bargaining.”<sup>20</sup> Whether some provision of the Constitution, “properly interpreted,” protects or prohibits this or that is a legal or normative matter, not a semantic one. So constitutional interpretation can yield answers regarding what the Constitution protects or prohibits only if what it serves up is legal meaning—i.e., the law.<sup>21</sup>

In short, we assume that constitutional interpretation—the activity that Lawson helpfully distinguishes from the broader activity of constitutional adjudication—aims at the Constitution’s legal meaning, which is to say that it aims, as Chief Justice Marshall put it in *Marbury*, to determine or ascertain “what the law is.”<sup>22</sup> Incidentally, at the end of the day, we do not think that the term “legal meaning” is optimal, for it is a misnomer that encourages the tendency of legal theorists to conflate semantic facts with legal facts.<sup>23</sup> It would be better, all things considered, to drop the terminology that suggests that the law is a type of meaning and to restrict

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18. Whittington, *supra* note 12, at 120.

19. *Id.* at 120–21.

20. *Id.* at 125.

21. See also, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 4, 37–44 (2001) (suggesting that interpretation proper is concerned with “identifying constitutional norms and specifying their meaning”; and endorsing the judgment that “constitutional meaning” for these purposes refers to “norms, values, or principles that the Constitution embodies,” not mere semantic or linguistic contents).

22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

23. As Mark Greenberg reminded us, the terminology also encourages an assumption of the erroneous view that textual bits or sentences correspond one-to-one with legal norms. A more plausible “holistic” view would hold that each legal norm is a function of a complex set of many facts, most probably including the meanings of many textual bits.

the term “meaning” to semantic facts proper. It would also be better to eliminate the redundancy in the term “semantic meaning.” But we retain and rely on this terminology in this Article in recognition of its wide usage in the literature.

With that issue resolved (provisionally, as we will see), we proceed to the second of our two proposed refinements to Lawson’s distinction, which is to shift focus from how we should go about discovering the law to what the law really is or consists of. Suppose, as appears to us, that what Lawson classifies as a normative theory of constitutional interpretation is a theory regarding how some persons (perhaps judges, perhaps everybody) should go about discovering what the constitutional law is, or what the law that the Constitution gives rise to is. So understood, such a theory would aim to give guidance regarding how to conduct a particular inquiry. It would be a theory of legal or constitutional epistemology. Essential to appreciate is that such a theory must presuppose an account of what it is that we are trying to discover, which is to say that it must presuppose an account of what the law is or consists of. Notice that scientific, mathematical, and moral questions are distinct from questions about how to conduct scientific, mathematical, and moral investigations, respectively. We are here marking the analogous distinction in the legal domain.

Some commentators have described the difference in vantage points that we are introducing as involving a shift from epistemology to metaphysics.<sup>24</sup> However, for reasons that would likely prove distracting to most of our intended audience, we are leery of the metaphysical label here. We would prefer to describe the different types of theories or accounts as pertaining to legal epistemology on the one hand and law on the other, where a “theory of law” concerns the ultimate facts or principles that determine or constitute legal norms, or (in Hartian terms) the ultimate “criteria of legal validity.”

What we have in mind will come across more clearly with the assistance of a few examples. So consider the following (actual or hypothetical) “ordinary” propositions of constitutional law: *Congress has authority to regulate intrastate activities that substantially affect interstate commerce in the aggregate; people, in their individual capacities, have a constitutional right to bear arms; legislative redistricting that is motivated by excessive partisanship is unconstitutional.* Constitutional lawyers do not think that norms or propositions like these are constitutionally “primitive” in the sense of being ultimate. Rather, constitutional propositions like these are determined, constituted, or validated by legal facts or principles that are more fundamental.

That is to say, part of what makes it the case that these statements express true or correct propositions or norms of constitutional law are other, more ultimate, legal facts or principles, such as: *the national government has lawful authority adequate to promote the nation’s economic well-being and*

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24. See, e.g., Greenberg, *How Facts Make Law*, *supra* note 11, at 178 (describing an account of the determination relationship—what he calls a “model”—as “the counterpart at the metaphysical level of a method of interpretation at the epistemic level”).

*its competitiveness in global markets; what constitutional provisions say is ordinarily the law even in the face of profound social and technological changes that would make such legal rules significantly less optimal today; and legislators may not create electoral rules that are designed to promote the electoral advantage of particular individuals or parties.* We are not here endorsing any of these particular principles, which we offer just for the sake of illustration. What we are claiming is that a normative theory of constitutional interpretation must presuppose a theory of the ultimate determinants or criteria of validity of our law.

The final important point is that, when it comes to theories of constitutional interpretation (in the narrower sense that is distinguishable from theories of adjudication), the theory or account of fundamental legal principles or facts that is presupposed is of vastly more interest and significance than is the epistemological theory that lies at the surface. To anticipate just a bit, suppose that an originalist position on this legal question is that the constitutional law in a case of first judicial impression is fully determined by what the authors of the constitutional text intended to say, or by what a hypothetical reasonable person at the time of ratification of a provision would have understood the authors to have said. The originalist's epistemological position—her “normative theory of interpretation”—would then direct how decisionmakers should go about determining (in the sense of discovering) what the authors did intend to say or what a hypothetical reasonable person would have understood the authors to have said.

To be sure, there are some things, not all of them obvious or uncontroversial, to be said on that score. But perhaps not very many—and certainly not many that are actively disputed in the literature on constitutional interpretation. After all, nonoriginalists rarely dispute originalists' views about how we should go about finding out what the Framers intended or what a hypothetical reasonable member of the text's original audience would have taken the text to mean, or similar such things, to the extent they matter. Consequently, a theory of constitutional interpretation understood as a theory that concerns in some respect what the law is, is ordinarily far less about *how* to ascertain that which is to be ascertained and far more about *what* it is that we should endeavor to ascertain. It is for this reason that Stanley Fish, an intentionalist, routinely emphasizes that intentionalism is “not a method.”<sup>25</sup> Instead, it is the thesis that “a text means what its author intends.”<sup>26</sup> That is the significant claim. If it is true, he explains, then “many of the debates about how legal interpretation should proceed lose their urgency and become evidence of just how strong a hold a mistake may have on an entire discipline.”<sup>27</sup>

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25. Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 643 (2005) [hereinafter Fish, *There Is No Textualist Position*]; see also, e.g., Stanley Fish, *The Intentionalist Thesis Once More*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 99, 99 (Grant Huscroft & Bradley W. Miller eds., 2011).

26. Fish, *There Is No Textualist Position*, *supra* note 25, at 645.

27. *Id.*



We do not share Fish's intentionalism as a claim about the (semantic) meaning of a text. Much less do we share his assumption that the semantic meaning of a legal text fully determines what the law is, or what contribution the enactment of that text makes to the content of the law. We do, however, fully share his insistence that we should be talking more, and more explicitly, about what it is that we should be looking for and less about how we should undertake that investigation. Accordingly, we think that the more illuminating nomenclature for marking the contrast that Lawson helpfully highlighted involves distinguishing theories of adjudication from theories of *law*, and not from theories of *interpretation*. Indeed, this is a fairly common way to carve things up in the jurisprudential literature.<sup>28</sup> For purposes of this Article, we define such theories as follows:

*Theories of law* are theories of the ultimate criteria of legal validity, or of the ultimate determinants of legal content—i.e., theories regarding what it is that gives the law in any given jurisdiction the content that it has.

*Theories of constitutional adjudication* are theories of what judges should do in the course of resolving constitutional disputes. Theories of adjudication presumably will include, though need not be reducible to, accounts of how some class of persons (paradigmatically judges) should try to determine or discover the Constitution's legal content, or what it is that the constitutional law provides. Such accounts could be termed *theories of constitutional interpretation* proper.

When somebody purports to be advancing a "theory of constitutional interpretation," it is useful to pause to ask whether, or in what respects, her theory is most faithfully classified as a theory of law, a theory of constitutional interpretation proper, or as a theory of adjudication.

To see how the views might combine, consider this very incomplete sketch of a familiar set of views: (1) the semantic meaning of the constitutional text fully determines or constitutes the Constitution's legal meaning or effect; (2) when trying to ascertain the semantic meaning of the constitutional text, courts should consult Founding-era dictionaries and may draw inferences from historical practices contemporaneous with ratification of the text; and (3) when adjudicating disputes, courts should enforce the law, except that they may craft doctrinal rules or tests (think of equal protection law's "tiers of scrutiny" and the myriad of rules that courts have developed under the First Amendment, for example) designed to facilitate judicial implementation or enforcement of the law, even if such implementing doctrines have the effect of underenforcing or overenforcing constitutional norms.

Proposition (1) would belong to a theory of (constitutional) law; proposition (2) would belong to that portion of a theory of (constitutional) adjudication properly described as a theory of interpretation; and

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28. See, e.g., SCOTT SHAPIRO, LEGALITY 247–48 (2011); Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1 (1998).

proposition (3) would belong to that portion of a theory of (constitutional) adjudication that lies outside its theory of interpretation.<sup>29</sup>

### B. *New Originalism and “New Originalism” Distinguished*

We will argue in the next Part that new originalism is predominantly a theory of law, and not of adjudication, as we have just explained those notions. But we suspect that merely to announce that thesis will immediately provoke skepticism from readers who are familiar with the so-called interpretation/construction distinction and view it as partly definitive of new originalism. Indeed, in his contribution to this symposium, Larry Solum identifies the embrace of that distinction, and the concomitant assignment of an important role to the activity denominated construction, as one of two factors that distinguish new originalism from old.<sup>30</sup> While the new originalists’ account of constitutional *interpretation* is (or might be) properly characterized as pertaining to a theory of law, the objection we have in mind would go, the notion of constitutional *construction* that they highlight and deploy surely belongs to the domain of adjudication. Accordingly, it might be thought, given the centrality of construction to new originalist thought, we should conclude that new originalism is very much a theory of adjudication and not (merely) a theory of law.<sup>31</sup> Whittington himself makes clear that a theory of interpretation must be supplemented by a theory of construction precisely to fill out the picture of adjudication.<sup>32</sup>

We agree that, when conducted by courts as opposed to other governmental actors,<sup>33</sup> construction does belong to a theory of adjudication and not to a theory of law. How then can we maintain that new originalism is a theory of law and not of adjudication?

The answer to this modest puzzle depends upon distinguishing “new originalism” from “New Originalism.” As we use these phrases, the former is an imprecise but possibly useful term of art that denotes a stage in the

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29. For further discussion of these types of theories, see Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013).

30. See generally Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). The other factor is the first one emphasized by Whittington: that the target of interpretation is original public meaning and not Framers’ intentions.

31. Some new originalists, Whittington in particular, emphasize that construction is a task for nonjudicial as well as judicial actors. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999). Therefore, it would be more accurate to describe construction as pertaining to a theory of “implementation” that encompasses, but is not exhausted by, implementation-by-adjudication.

32. See, e.g., Whittington, *supra* note 12.

33. In his initial work on the subject, *Constitutional Construction: Divided Powers and Constitutional Meaning*, Whittington focused heavily on constitutional construction by nonjudicial actors, thereby inviting the impression that construction is, in his view, a task only for the political branches. He has subsequently made clear that that is not his view. Compare WHITTINGTON, *supra* note 31, at 1, with Whittington, *supra* note 12, at 127–29. It is assuredly not the view of others who have embraced the interpretation-construction distinction.

development of a general idea or thesis (the general thesis denominated “originalism”), whereas the latter is a proper name referring to what is, loosely speaking, a school that subscribes to a concatenation of views, including a particular version of originalism and supplementary claims about constitutional construction. In order to prevent any unnecessary confusion, we shall use the term “neo-originalism” henceforth to refer to what we have so far been calling “new originalism.” The “new originalism” (lower case) of our title, which had to be capitalized because of typographical conventions, is what we are now calling “neo-originalism.” New Originalists endorse neo-originalism and *also* believe that constitutional adjudication includes construction as well as interpretation. The notion of constitutional construction is a part of the New Originalist platform, if you will, but not a part of neo-originalism, which is the brand of originalism that New Originalists endorse.

We have two principal reasons for locating the New Originalist theory of construction outside the boundaries of originalism, properly understood. First, this is what prominent New Originalists have themselves said. Whittington has explained, “*originalism is incomplete* as a theory of how the Constitution is elaborated and applied over time. Although originalism may indicate how the constitutional text should be interpreted, it does not exhaust what we might want to do and have done with that text.”<sup>34</sup> Yet more pointedly, he adds, “Construction is a necessary feature of constitutionalism, and originalism can accept it as a *supplementary theory* of constitutional elaboration.”<sup>35</sup> The New Originalist Randy Barnett similarly emphasizes: “Originalism is not a theory of what to do when original meaning runs out.”<sup>36</sup> A theory of constitutional construction, we take it, is designed to serve that additional function.

Second, and more substantively, a theory of construction can be, and in fact is, shared by originalists and nonoriginalists alike—as Whittington, again, has recognized.<sup>37</sup> This can be seen by contrasting the standard or orthodox model of constitutional adjudication with a competing picture that one of us has dubbed the “two-output” model.<sup>38</sup>

According to the standard account (represented on the left in Figure 1, below), courts do (or legitimately do) only two things in the course of constitutional adjudication: first, they interpret the Constitution to determine what the law is; second, they apply the constitutional norms that

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34. Whittington, *supra* note 2, at 611 (emphasis added).

35. *Id.* at 612 (emphasis added).

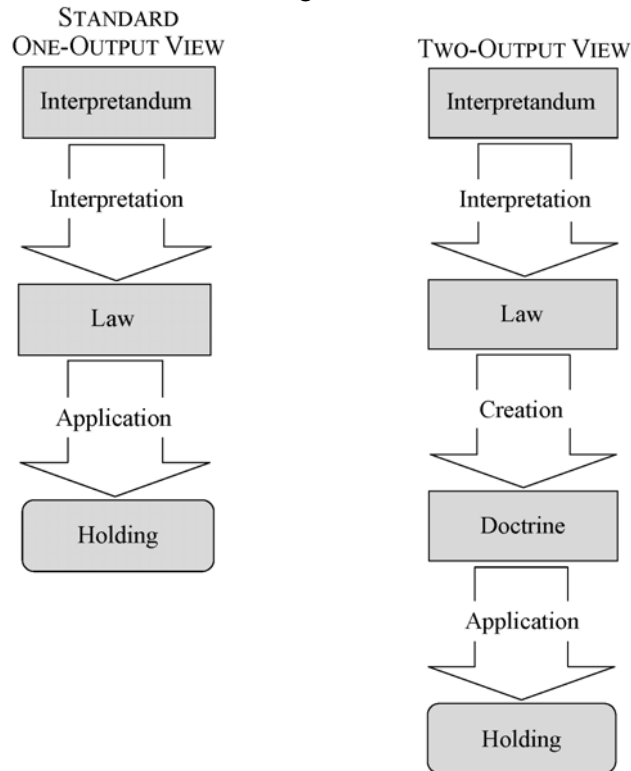
36. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69 (2011).

37. See Whittington, *supra* note 12, at 120 n.3 (noting that keeping theories of construction outside of originalism properly understood allows them to be of use to persons who eschew originalist theories of interpretation or of law); Keith E. Whittington, *On Pluralism Within Originalism*, in THE CHALLENGE OF ORIGINALISM, *supra* note 25, at 70, 76 (“The distinction between interpretation and construction does not depend on accepting originalism as the appropriate approach to interpretation.”).

38. See, e.g., Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006).

interpretation delivers to the facts to produce a case-specific holding. In contrast, the two-output model (represented on the right in Figure 1) emphasizes that, even before they come to apply legal norms to case-specific facts, courts routinely, and by necessity and with legitimacy, engage in *two* conceptually or logically distinct tasks: they try to discover the content of legal norms to which the Constitution gives rise; and they craft legal rules, tests, or doctrines in order to implement, administer, or enforce the discovered legal norms. This is true not only of controversial judicially crafted doctrines like the *Miranda*<sup>39</sup> warnings and *Roe v. Wade*'s<sup>40</sup> trimester rule. It is true as well of literally countless constitutional doctrines that strike most constitutional lawyers and scholars as utterly unremarkable—from the tiers of scrutiny that implement, or give effect to, the Equal Protection Clause; to Fourth Amendment tests that have the effect of supplanting a single general norm of reasonableness with more sharp-edged rules for specific contexts (like automobiles or borders); to the many rational basis tests and similar doctrines that direct courts to accord some measure of deference to decisions made by political actors; and on and on.

Figure 1



39. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

40. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

This “two-output” model is increasingly accepted by originalists and nonoriginalists alike. Indeed, one of us, an avowed nonoriginalist, has defended a version of it at length in previous work.<sup>41</sup> We will explain below that (at least in Whittington’s hands) “construction” is essentially the step in the two-output model of the right-hand diagram that (in an effort to avoid the appearance of taking early sides between originalists and nonoriginalists) we labeled “creation.” Insofar as this is so, there is nothing about the construction part of the New Originalist package that is particular to originalism.

Our claim, accordingly, will be that neo-originalism is centrally a theory of law. New Originalism is a portfolio of views that contains as its central element the neo-originalist theory of law, and also contains a theory of adjudication that supplements that theory of law. Significantly, that theory of adjudication assigns a prominent role to the notion of construction that, strictly speaking, lies outside of originalism’s boundaries and is actually shared by some nonoriginalist positions. Because we are interested here in how neo-originalism differs from old originalism, and not in those aspects of New Originalism that fall outside of neo-originalism, we will take the liberty of identifying as neo-originalists theorists who might not self-identify as New Originalists.

## II. ORIGINALISM, OLD AND NEW

In this Part, we provide evidence for our two-part claim that older originalism was principally a normative theory of constitutional adjudication and that most of the more recent originalist theorizing advances an account of what determines or constitutes legal norms. In doing so, we also emphasize that this is a generalization that admits of exceptions.

### A. A First Glance

As Whittington rightly says, older originalist writings were chiefly driven by concern with judicial subjectivity.<sup>42</sup> The central first generation originalist claim, pressed repeatedly, was that originalist interpretation is required because it is the only effective way to keep judges—especially the willful liberal justices of the Warren and Burger Courts—from resolving constitutional disputes based on their personal predilections and subjective value choices.

For example, in the passage from his classic 1971 article that comes the closest, among then-contemporary statements, to articulating what would

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41. See, e.g., Berman, *supra* note 38; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487 (2004); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005).

42. See *supra* note 5 and accompanying text. For much the same claim, see also, for example, John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83 (2003); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

become known as originalism, Robert Bork argued, “Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”<sup>43</sup> Similarly, Ed Meese explained and defended the Reagan Administration’s “jurisprudence of original intention” on the ground that “the original meaning of constitutional provisions and statutes [is] the only reliable guide for judgment. . . . [O]nly ‘the sense in which the Constitution was accepted and ratified by the nation,’” Meese continued, “and only the sense in which laws were drafted and passed, provide a solid foundation for adjudication.”<sup>44</sup> Lastly, observing that “the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law,” Justice Scalia advocated “the ‘originalist’ approach to constitutional interpretation” as “the lesser evil” in large measure because it “does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”<sup>45</sup>

Notice that all of these passages facially amount to claims about how judges should behave, or what they should do. At least on their faces, they advocate normative theories of adjudication rather than theories about what are the ultimate criteria of validity for constitutional law, or (put slightly differently) of what are the ultimate determinants of the contents of constitutional norms or propositions. For Bork, the judge must stick close to text and history not because text and history alone constitute the law but because any departures would be unprincipled.<sup>46</sup> For Meese, original meaning or intentions should be followed not because they ultimately determine the law but because they alone provide a “reliable guide for judgment” or “a solid foundation for adjudication.”<sup>47</sup> For Scalia, originalism is “the lesser evil,” not because it is predicated on the correct understanding of what the law is, but because it is “more compatible with the nature and purpose of the Constitution in a democratic system” and because its “practical defects” are less damning than are the practical defects that bedevil nonoriginalism.<sup>48</sup>

Of course, it is certainly possible that these positions entail, imply, or assume certain views about what the determinants of the law are. But three things should be emphasized. First, and to repeat, that is not what these writers say. Indeed, as the preceding paragraph aims to show, it is *conspicuously* not what the above quoted passages say. Second, translating

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43. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

44. Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985) in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 54 (Steven G. Calabresi ed., 2007).

45. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852, 863–64 (1989).

46. See *supra* note 43 and accompanying text.

47. See *supra* note 44 and accompanying text.

48. Scalia, *supra* note 45, at 862–63.

what they say into implicit claims about the ultimate criteria of legal validity or the ultimate determinants of legal contents hardly projects to be a straightforward or seamless business. For one thing, the reasons that the relevant writers give for their proposals regarding proper adjudication look like the wrong sorts of reasons to undergird theories of law. For example, the fact that a scrupulous adherence to what is demanded by original intents dramatically constrains judges' discretion and willfulness, even if true, is not an obvious reason for concluding that that particular posture delivers true or correct legal norms.

Third, in contending that the old originalists were principally advancing a theory of adjudication, we are not painting them in a worse light, or even a different one, than the one in which we would also paint their chief antagonists—not neo-originalists, but *nonoriginalists*. Since substantiating this claim fully would consume more space than the effort would be worth, we here limit ourselves to a couple of examples. Consider, Justice Breyer's admonition that "the Court should interpret written words . . . in the Constitution . . .," and more generally, use the "traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences" to "help make the law effective in practice."<sup>49</sup> In a broadly similar vein, albeit one that valorizes judicial precedent decidedly more heavily, David Strauss recommends the "common law approach"—namely, "[r]easoning from precedent, with occasional resort to basic notions of fairness and good policy"—as both the actual and proper "way of resolving legal issues," including those implicating "constitutional questions."<sup>50</sup> Nonoriginalist theories or approaches such as these certainly appear to offer prescriptions regarding how judges should undertake the task of constitutional adjudication, and not accounts of the ultimate criteria of legal validity, or of the ultimate determinants of the contents of legal norms.

With these clarifications and qualifications in mind, contrast the early or "old" originalist claims (and common nonoriginalist claims too, for that matter) with passages from the more recent originalist theorists. To start, take Vasan Kesavan and Michael Paulsen, who contend,

It is simply not consistent with the idea of the Constitution as binding law to adopt a hermeneutic of textualism that permits individuals to assign their own private, potentially idiosyncratic meanings to the words and phrases of the Constitution. The meaning of the words and phrases of the Constitution *as law* is necessarily fixed as against private assignments of meaning.<sup>51</sup>

And in a statement whose clarity (for our purposes) could hardly be improved upon, Steven Calabresi and Sai Prakash maintain, "Originalists do not give priority to the plain dictionary meaning of the Constitution's

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49. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 73–74 (2010).

50. DAVID A. STRAUSS, THE LIVING CONSTITUTION 43, 47 (2010).

51. Kesavan & Paulsen, *supra* note 42, at 1130 (emphasis added).

text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.”<sup>52</sup>

In these passages, originalism clearly serves as a theory of law: insofar as judges should follow or enforce some fixed original aspect of the constitutional text, they should do so because that fixed aspect—“the plain dictionary meaning,” in the estimation of Calabresi and Prakash—is the law. This is representative, we believe, of the neo-originalist thinking. As the originalist Steven Smith has observed, “originalism insists (with some arguable lapses . . .) that what counts as *law*—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.”<sup>53</sup> According to Smith’s conception, which we deem accurate, contemporary or neo-originalism is principally a theory about “what counts as law.”<sup>54</sup>

It is no accident that originalism has evolved from a theory about the principles that judges should follow when adjudicating legal disputes to a theory about what the law is. There is good reason for it. If originalism is only a theory of adjudication, and not instead centered on an account of the ultimate criteria or determinants of our constitutional law, then its claimed superiority relative to the alternatives becomes plausible only when those alternatives are grossly caricatured. This is why old originalists routinely presented the choice facing legal interpreters as binary: either strict adherence to the original meaning or intent, or wholly unconstrained wishful thinking—“the heavens or the abyss,” as Dan Farber and Suzanna Sherry aptly put it.<sup>55</sup> That is surely a naively limited characterization of the possibilities, one that gains whatever apparent plausibility it might enjoy from a worldview that imagines all nonoriginalists as Justices Brennan and Marshall, and none as, say, Justice Breyer or Souter. In contrast, if originalism were a theory of law then the conclusion that it is right and all competing accounts are wrong would not depend upon indefensible characterizations of those competitors. It is plausible that this is a matter that by its nature admits of only one right answer.

To be sure, we do not deny that hints (or more) of a theory of law can be found in early originalist writings. In fact, we think that Raoul Berger, as important an old originalist as can be found, is best read as maintaining not only (or even principally) that the intentions of the Framers provide a useful or reliable guide for judicial decisionmaking in a democracy, but that they constitute what the constitutional law is.<sup>56</sup> But insofar as this is his view, he lacked the theoretical sophistication, or even the instinct, to advance much in the way of argument for it. In any event, our goal here is to

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52. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 552 (1994).

53. Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 193 (2010).

54. *Id.*

55. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 3 (2009).

56. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).



describe and highlight two strands of originalist thinking, not to mark a sharp or crisp boundary between the two.

*B. The Distinction Is Not Strictly Temporal*

To be a little more precise, our goal is to mark two strands of originalist thinking that we believe are fairly, if imperfectly, associated with different historical stages in the development of originalism. By and large, we maintain, first generation originalists advocated judicial adherence to some fixed originalist object for reasons that did not depend upon any particular view about the ultimate criteria or determinants of constitutional law. Many or most originalists of subsequent generations, in contrast, have relied in the first instance precisely on the fundamental legal view that the constitutional law is determined by, or is entirely a function of, certain unchanging historical facts. This contention belongs to a theory of law. Insofar as these neo-originalists believe, with the older originalists, that judges should adhere to the original meaning or intention, that claim about adjudication follows from the relatively uninteresting premise—substantive and contestable, to be sure, but not terribly controversial as a matter of fact—that judges should (more or less) enforce the law.<sup>57</sup>

At the risk of belaboring, we are not saying that old originalism is incompatible with the neo-originalist account of the ultimate criteria or determinants of law, or that old originalists rejected or would have rejected that account. Nor are we saying that neo-originalists end up prescribing forms of judicial behavior significantly different from what old originalists prescribed. Our key claim concerns explanatory priority. Old originalism argued for a theory of adjudication and was not committed to any implications such a theory might have for a theory of law. Neo-originalism argues primarily for a theory of law and only derivatively and contingently for a theory of adjudication.

The generalization can be highlighted by briefly recognizing some exceptions—older originalists whose views are more clearly grounded in an account of law, and newer originalists whose views seem mostly motivated by commitments regarding adjudication. Lino Graglia is an example of the former. His commitment to originalism, Graglia explains, is rooted in what he considers a “very simple” proposition, “almost a tautology: the Supreme Court should not hold anything unconstitutional that is not unconstitutional, i.e., that is not, in fact, prohibited by the Constitution.”<sup>58</sup> And what the Constitution prohibits, he continues, depends entirely on whatever norm the

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57. The parenthetical is needed to accommodate both the near-universal acceptance of some doctrines of justiciability that effectively direct courts not to enforce the law, and the more limited, but growing, embrace of a “two-output” picture of proper constitutional adjudication, along with recognition that some legitimate or even optimal constructed doctrines underenforce the constitutional norms that interpretation serves up. On underenforcement, see, of course, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

58. Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 634 (1993).

authors of the constitutional text “intended to convey.”<sup>59</sup> Although a contemporary of Bork, Meese, and Scalia, and thus plainly an “older” originalist, chronologically speaking, Graglia grounds his advocacy of originalist adjudication squarely on an account, if more asserted than argued for, of the ultimate criteria or determinants of law.

John McGinnis and Michael Rappaport exemplify the other possibility. They are energetic and respected contributors to the current theoretical defenses of originalism who are, at the same time, throwbacks. McGinnis and Rappaport foreground a normative theory of adjudication and background jurisprudential claims about the ultimate criteria or determinants of the law. Their “normative defense of originalism,” as they call it, is chiefly premised on the pragmatic or consequentialist argument “that originalism advances the welfare of the present day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories.”<sup>60</sup> Loosely speaking, this is an argument about why judges should render originalist decisions or interpret the Constitution in an originalist manner. It is hard to make sense of this as an argument about the ultimate criteria of legal validity or determinants of the content of the existing law.

### III. THE NEO-ORIGINALIST ACCOUNT OF THE ULTIMATE CRITERIA OR DETERMINANTS OF CONSTITUTIONAL LAW

Here, we try to make more precise the account of law that neo-originalists assert. After doing so, we acknowledge that this account differs from that put forth by the influential New Originalists Larry Solum and Randy Barnett, and we explain why the competing account of constitutional interpretation that they advocate should be favored by neither originalists nor nonoriginalists.

#### A. Another First Glance

We have just argued that neo-originalists (an analytical classification that highly correlates with, but is not reducible to, a temporal one) are centrally committed to a claim about the ultimate criteria or determinants of constitutional law. To a first approximation, we can represent this neo-originalist thesis as follows:

- (OL) The constitutional law ultimately consists solely of (some form of) the fixed semantic meanings of the inscriptions in the constitutional text.

This is only a first approximation of the core new originalist claim about the ultimate criteria or determinants of constitutional law and is susceptible to improvements. Significantly, it makes no allowance for the possibility that judicial decisions purporting to implement the Constitution also contribute

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59. *Id.* at 631.

60. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

to the content of constitutional law even in the absence of any textual provision in the constitutional text that permits such contributions. Few originalists would deny this possibility or actuality, however, notwithstanding that some also believe that courts should not continue to abide by judicial precedents that depart from the norms constituted by fixed semantic meanings of the constitutional text.

An alternative rendering of the central neo-originalist thesis that better accommodates this additional set of ultimate determinants of the content of constitutional law could be formulated as follows:

- (OL') The constitutional law ultimately consists of (some form of) the fixed semantic meanings of the inscriptions in the constitutional text, though judicial precedents that depart from the fixed semantic meanings of the inscriptions in the constitutional text are legally authoritative for nonjudicial actors and for inferior judges.<sup>61</sup>

To repeat, we believe that all neo-originalists, in virtue of being neo-originalists, accept (OL) or (OL'), or something quite close to them. But the phrase "(some form of) the fixed semantic meaning" is intended to be ecumenical among original public meaning (advocated in one form or another by Steven Calabresi, Michael Paulsen, the self-described New Originalists, and others), authorially intended meaning (advocated by intentionalists such as Larry Alexander, Stanley Fish, and Richard Kay), and any roughly similar constructs.

From what we have said in Part I, however, it follows that (OL) and (OL') are distinct from claims that belong to a theory of adjudication with respect to which neo-originalists may differ from each other. Consider, for example, these claims with respect to which neo-originalists in good standing disagree:

- (D) Courts are duty-bound to enforce the constitutional law insofar as it is discoverable.
- (C) Courts act properly in supplementing, in suitably cabined ways, the legal norms that result from legal interpretations with implementing rules or devices that they generate through constitutional constructions.

While Lawson insists that (D) requires argumentation that originalism itself, properly understood, does not supply, other originalists believe it is a nonoptional part of originalism. Nelson Lund, for example, describes his own "very simple-minded view of judicial duty in constitutional cases" thusly: "Supreme Court Justices should just apply the law. . . . If I had to

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61. As formulated, (OL') might be taken to carry the pragmatic implicature that Supreme Court justices are not bound by precedents that depart from textual meaning. We hereby cancel that implicature. Neo-originalists are divided and unclear about the precise legal status of judicial precedents that depart from or contradict the fixed semantic meanings or communicative contents of textual inscriptions. (OL') is our good-faith and first-pass attempt to capture what many or most seem to have in mind. But a precise statement must be provided by those who endorse the view.

put a label on my own position, it would be ‘originalism.’ The Constitution is a written document that means what its words, in context, would reasonably have been understood to mean at the time it was adopted.”<sup>62</sup> And as our previous discussion of construction indicates, New Originalists such as Whittington, Barnett, and Solum among others have argued forcefully for (C), while McGinnis and Rappaport, among others, reject it.

Be that as it may, our central contention, again, is that neo-originalists are committed to (OL) or (OL’). Indeed, it is precisely neo-originalism’s commitment to some such thesis that distinguishes it from old originalism. As we emphasized toward the end of the preceding Part, old originalism is largely compatible with (OL) or (OL’), and we conjecture that many old originalists would have found these theses congenial and would have accepted them if they had actually considered the relevant question. But such counterfactual acceptance of or reliance on (OL) or (OL’) is not what distinguishes neo-originalism from its forbear; it instead is what distinguishes originalism from nonoriginalism.

That is how things look to us. Before we can be confident of this claim, however, we must address a competing view advanced by some prominent New Originalists that has not attracted quite the attention we believe it warrants. As we read them, the writings of two of the most respected and influential recent originalist theorists, Larry Solum and Randy Barnett, suggest that originalism is *not* committed to (OL) or (OL’) or anything in their vicinity. In the remainder of this Part, we show how Solum and Barnett reach that heterodox conclusion and we explain why we believe they are mistaken.

### B. Interpretation Reconsidered

Recall what we argued in Part I. Following Lawson and Whittington, we said that (1) neo-originalist theories of constitutional interpretation concern constitutional meaning; (2) the constitutional meaning at which constitutional interpretation aims is (for neo-originalists as for many others) its “legal” meaning or significance; therefore (3) neo-originalist theories of constitutional interpretation concern the determinants of constitutional law, which is why their theories of constitutional interpretation are fairly, and more perspicuously, described as theories of constitutional law. And what view of the ultimate criteria or determinants of constitutional law do neo-originalists advance? That is the view captured (more or less) by (OL) or (OL’).

None of this, we think, will surprise many readers. Consider the “fairly basic definition of originalism” that Whittington offered a decade ago: “Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>63</sup> Disambiguating the ambiguity that we

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62. Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors*, 19 GEO. MASON L. REV. 1029, 1029 (2012).

63. Whittington, *supra* note 2, at 599.

noted in Part I, we interpret this to be broadly equivalent to: originalism regards the original *semantic* meaning of the constitutional text to be *legally* authoritative, in the sense that it constitutes what the law is (subject to the qualifications that (OL') or its kin would introduce).

Solum, however, denies (2)—that the constitutional meaning at which constitutional interpretation aims is its legal meaning or significance. “The basic idea” that undergirds the interpretation-construction distinction, he explains in a recent article, depends upon a distinction between

two different moments or stages that occur when an authoritative legal text (a constitution, statute, regulation, or rule) is applied or explicated. The first of these moments is interpretation—which I shall stipulate is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text. The second moment is construction—which I shall stipulate is the process that gives a text legal effect (either my [sic] translating the linguistic meaning into legal doctrine or by applying or implementing the text). . . . Although the terminology (the words “interpretation” and “construction” that express the distinction) could vary, legal theorists cannot do without the distinction.<sup>64</sup>

Notice two things. First, once again, Solum helpfully draws attention to the ambiguity that we identified in Part I by asking: what type of meaning—semantic or legal—does interpretation aim at? Second, he expressly resolves that question in the way opposite to how we have claimed that it is usually resolved. Succinctly put, according to Solum, “interpretation yields semantic content”; it is the job of construction, and construction alone, and not interpretation, to “determine[] legal content or legal effect.”<sup>65</sup> Significantly, this is true *even when* the semantic meaning is readily discoverable, unambiguous, and not vague.

To appreciate the significance and exceptional nature of this claim, contrast it with the following characterization of neo-originalism offered by Amy Barrett in an introduction to a recent symposium:

[N]ew [or neo-]originalists do not contend that the Constitution’s original public meaning is capable of resolving every constitutional question. The Constitution’s provisions are written at varying levels of generality. When the original public meaning of the text establishes a broad principle rather than a specific legal rule, interpretation alone cannot settle a dispute. In that event, the need for construction arises.<sup>66</sup>

There is nothing unusual about this description; similar descriptions abound. Yet it does not get Solum’s version of neo-originalism quite right. For Solum, it is *never* the function of constitutional interpretation to yield legal norms: “construction also occurs in situations where it is overlooked

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64. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

65. *Id.* at 100; see also, e.g., Solum, *supra* note 13, at 973.

66. Amy Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1, 1–2 (2010).

or invisible, because interpretation has already done the work.”<sup>67</sup> Interpretation alone can never “settle a (legal) dispute” because it is never its function to deliver the law. Barnett’s characterizations of the two adjudicative processes or activities echo Solum’s: “*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances.”<sup>68</sup>

The two different pictures or models of interpretation articulated by distinguished New Originalists can be displayed graphically. In Figure 2 below, the Whittingtonian model appears on the left. It is simply the two-output model presented earlier, with two modest revisions. First, the second stage that produces the second set of outputs is renamed. That stage had previously been labeled “creation” to indicate merely that it is a creative endeavor that aims to produce something new, and in that way is distinguishable from the interpretive activity of trying to discover what already exists. We now label it “construction” because that is the New Originalist name for this creative activity. We take this to be a nonsubstantive change.

Second, we have added the qualifier “fixed” to indicate that, on the standard originalist version of the two-output model, the first output—the law—is unchanging (absent formal constitutional amendment). Nonoriginalist adherents of the two-output model do not accept that particular claim about the legal norms that interpretation is supposed to deliver.

The diagram on the right aims to capture Larry Solum’s alternative version of neo-originalism. The absolutely critical point is that it differs from the Whittingtonian picture in presenting semantic meaning (or rather, and more precisely, communicative content),<sup>69</sup> *and not law*, as the output of constitutional interpretation. On the Solumine view, construction is always required to produce anything that counts as law. The law can enter the scene only when ushered in by an episode of construction.

So, how does construction operate in Solum’s picture? Although we doubt that there exists a clear or definitive answer to this question, we read Solum and Barnett to identify at least two paths. Often, construction generates general legal norms—norms such as *unreasonable searches are unconstitutional*, and *sex- or gender-based classifications violate the constitutional guarantee of equal protection if not substantially related to an important governmental interest*. (On the Whittingtonian picture, the former norm is almost certainly the product of interpretation, whereas the latter would be the product of construction; on the Solumine model, both norms, qua norms, are the product of construction.)

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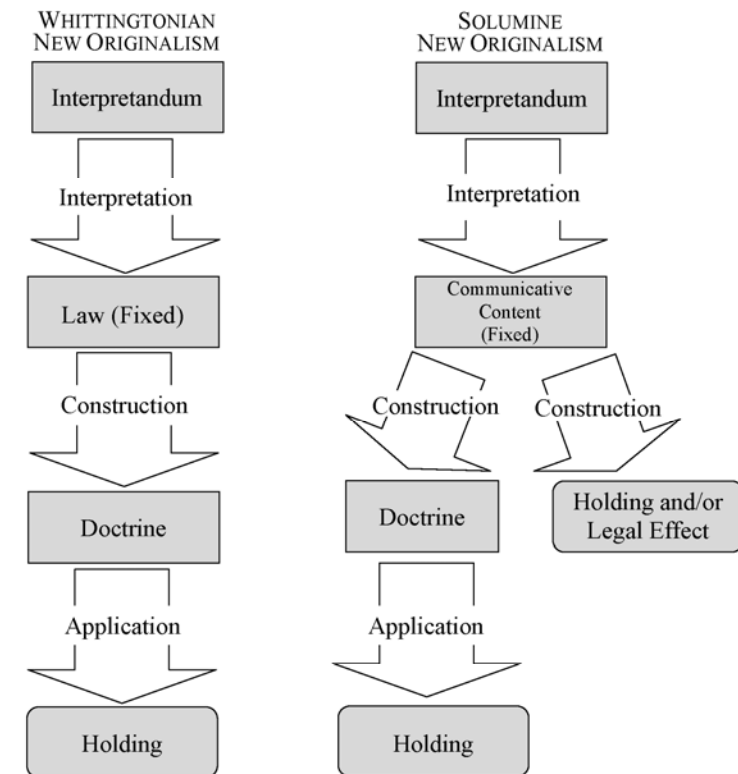
67. Solum, *supra* note 64, at 107.

68. Barnett, *supra* note 36, at 66.

69. Recall our earlier proviso, *supra* note 15, that, given our limited purposes in this Article, we will dispense with distinguishing these two kinds of linguistic contents. Given his purposes, Solum rightly distinguishes them.

Other times, courts resolve constitutional disputes without pausing to announce any general constitutional norms: they might simply hold that *this* particular statute or governmental action violates this or that constitutional provision. As we read Solum and Barnett, they treat legal tests or rules and legal holdings that are reached without the mediation of a legal rule as equally the “law” that construction is called upon to deliver. We have tried to capture this view of construction by depicting alternative paths by which construction may legitimately proceed after interpretation. The path on the left represents construction by means of “translating the linguistic meaning into legal doctrine.”<sup>70</sup> The path on the right represents construction by means of “applying or implementing the text.”<sup>71</sup>

Figure 2



### C. Resolution

Thus far, it is not entirely clear that other neo-originalists or anyone else need to disagree with Solum. For Solum is careful to acknowledge that his definition of “constitutional interpretation” as the process or activity of trying to discern the linguistic or semantic meaning of the constitutional text is stipulative. He does not deny (though he may in fact doubt) that

70. See *supra* note 64 and accompanying text.

71. See *supra* note 64 and accompanying text.

many or most constitutional lawyers and theorists, originalists included, conceive of constitutional interpretation as the process or activity of trying to determine the Constitution's legal meaning or effect. As Ronald Dworkin has observed in a different context, "Nothing turns on which way we speak so long as we make plain what further point we wish to make in speaking that way."<sup>72</sup>

But therein lies the rub. We have no reason for challenging whatever stipulations Solum and Barnett wish to make, unless their stipulations get in the way of theoretical insight or progress. One point that these theorists apparently wish to make, or a goal they hope to achieve, is to advance the debate between originalism and nonoriginalism by clarifying for the participants what precisely has been in dispute. We believe that their idiosyncratically narrow conception of constitutional interpretation actually prevents them from realizing that worthy goal.<sup>73</sup>

This worry would not arise if Solum and Barnett, although defending a narrower conception of the target or output of "interpretation" than we believe is standard among both neo-originalists and nonoriginalists, nonetheless defended a conception of construction that somehow ended up committing them to (OL) or (OL') or some close variant, and also located this conception within originalism.<sup>74</sup> If they had done both of these things, then the difference between the standard (Whittingtonian) neo-originalist view of constitutional interpretation displayed on the left and the Solumine view displayed on the right would have amounted to little more than a negligible difference in bookkeeping. All relevant parties would have agreed that originalism properly understood is committed to the proposition that the constitutional norms in our polity are constituted ultimately by the fixed semantic meaning of the constitutional text—with a proviso that the meanings of some provisions would be subject to refinement when they fail to furnish sufficient guidance because of vagueness or other semantic indeterminacy. The only difference between the two groups would have been that the former would have conceived semantically determined constitutional norms as products of "interpretation," whereas the latter would have conceived them as products of the combined efforts of "interpretation" and "construction."

However, Solum and Barnett do not make either of these claims and it is very doubtful that they could. First, given the active and creative nature of construction, it is unclear how they could have a conception of construction that is committed to (OL) or (OL') as a thesis about what the ultimate criteria or determinants of constitutional law are, rather than as a thesis about how to conduct constitutional adjudication. In other words, even though Solum and Barnett strongly intimate that when interpreted semantic

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72. Ronald Dworkin, *Hart and the Concepts of Law*, 119 HARV. L. REV. F. 95, 98–99 (2006).

73. For more elaborate argument along these general lines, see Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39 (2010).

74. See *supra* Part II.A–B.



meaning is unambiguous and not vague courts should (absent, perhaps, exceptional circumstances) construct “doctrine” that mirrors that semantic meaning, it is hard to see how the arguments they must muster for this proposition would amount to the neo-originalist contention that the law is determined or constituted by the text’s fixed semantic meaning, as opposed to the older originalist contention that judicial decisionmaking that follows this prescription is desirable or required. Even if Solum and Barnett were to maintain that judges engaged in “construction” are *legally* obligated to convert the semantic meaning of constitutional provisions into legal norms with the same content or effects, that would still fall short of the neo-originalist claim—voiced, as we have seen, by such card-carrying originalists as Calabresi, Lund, Paulsen, and Prakash—that the semantic meaning of the text constitutes the law all by itself. To understand the difference, imagine yourself in the shoes of a conscientious legislator who is committed to following the law. On the view held by Calabresi et al., that commitment has content: there is law out there, legally binding on legislators even before the courts perform their constructions. In contrast, on the view that we are attributing, hypothetically, to Solum and Barnett, there is no law for you to obey before the process of construction, only semantic meanings of the text. (For comparison, suppose that you are legally obligated to build Jones a house. Obviously, that alone would not entail that the house already exists and that Jones is legally entitled to it.) Second, both authors appear to reduce originalism to a claim about constitutional interpretation. As noted in the introduction, Barnett has stated expressly that a theory of construction *supplements* originalism, rather than being a component of it.<sup>75</sup> And Solum has offered broadly similar remarks.<sup>76</sup>

The upshot is that, by turning originalism into a semantic thesis, Solum and Barnett are compelled to attribute to nonoriginalists the denial of the claim that the semantic meaning of the constitutional text is fixed, not just the denial of the claim that the legal meaning of the Constitution is fixed. As Barnett observed: “To the extent they are offering a method of

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75. This has not been Barnett’s consistent position. In his widely cited 1999 article, Barnett suggested that constitutional construction was called for *only* when the semantic meaning of the constitutional text was “underdeterminate” or could support “more than one rule of law.” Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645–46 (1999). It is even unclear from that piece whether Barnett believed that original meaning exhausted a proper *interpretation*, let alone a proper construction. Whereas the current Solum-Barnett picture paints original meaning as the alpha and omega of interpretation (though not of adjudication), Barnett had endorsed the more modest position that “original meaning should be the starting point of constitutional interpretation.” *Id.* at 648.

76. See, e.g., Solum, *supra* note 64, at 109 (“Originalists use the [interpretation-construction] distinction to mark the difference between the Originalist enterprise of determining the linguistic meaning of the Constitution . . . and the nonoriginalist enterprise of specifying the content of constitutional doctrine where the Constitution is vague (or otherwise underdeterminate).”). Admittedly, this passage leaves matters a little unsettled because it does not indicate whether the enterprise of specifying the content of constitutional doctrine when the semantic meaning is *not* “vague (or otherwise underdeterminate)” is properly characterized as “originalist.” *Id.*

interpretation, [nonoriginalists] are making empirical claims about the semantic meaning of the text of the Constitution today, or the semantic meaning of what the Supreme Court has said in its opinions.”<sup>77</sup> But the suggestion that a thesis of what could be called semantic variantism is any recognizable part of nonoriginalism, let alone the dominant or central commitment, strikes us as plainly mistaken.<sup>78</sup> The dispute between originalism and nonoriginalism is a *legal* dispute, not a semantic or linguistic one.<sup>79</sup> Both originalists and nonoriginalists could do a better job than, by and large, they have been doing in incorporating the well-confirmed results of linguists and philosophers of language, and such results may have clear-cut, hitherto-overlooked implications for the legal points in contention. But up to this point, the issues in contention between originalists and nonoriginalists have been legal issues as to what legal implications semantic facts have, even assuming the fixity of meanings. In short, the critical distinction that New Originalists should strive to capture is between the activities of (a) finding, discovering, or inferring the law, and (b) refining, supplementing, or (possibly, in some cases) revising that law. The important distinction does *not* lie between (c) finding the semantic meaning of the constitutional text, and (d) devising the law that reflects the found meaning in varying degrees.

To be sure (and to play Stanley Fish for a moment), we disavow any authority to insist that “constitutional interpretation” is the activity of discovering the law.<sup>80</sup> If Solum or others feel strongly that interpretation should be reserved exclusively for semantic inquiries, we need not quarrel. What we do insist is that, if “constitutional interpretation” were defined this way, then originalism cannot, absent radical revision, be conceived as an account of constitutional interpretation. Originalism is almost universally understood as a legal thesis of some sort—that is, as pertaining, for example, either to the content of law or to the obligations of judges—and not as a theory of the semantic meaning of the constitutional text. Put

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77. Barnett, *supra* note 36, at 70.

78. It may be worth observing that originalists like Solum and Barnett assume that semantic meanings of constitutional texts are not only fixed, but fixed by the understanding of the writers and the audience at the time of Framing and ratification. In fact, however, some work in the philosophy of language and mind would support the view that the semantic meaning of the constitutional text is not fixed by the understandings of the writers and their audience at the time of writing, even as those understandings are reflected and summed up in contemporaneous dictionary entries. The *loci classici* here are a number of seminal articles included in TYLER BURGE, *FOUNDATIONS OF MIND* (2007).

79. Solum and Barnett both try to gain mileage from the fact that, in contract law, “interpretation” is a search for the communicative content of an agreement, while “construction” operates upon that communicative content to generate the contract’s legal effect. We think that the analogy between constitutions and contracts is less tight than they do, in part because the former are sources of law and the latter are not. Ultimately, more needs to be said on this score, of course. Here we wish simply to flag a concern.

80. See Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1133 (2008) (“It is certainly true that if you want to call something (including flipping a coin for that matter) interpretation, I can’t stop you. And, as a matter of fact, I don’t have a strong stake in the word interpretation.”).

another way, Solum's allowance that "[o]riginalists typically believe that the text operates as a constraint on other methods,"<sup>81</sup> does not, in our view, come close to identifying or distinguishing the thesis that self-described originalists have vigorously defended, and that their critics have strenuously challenged, in thousands of law review pages over the past decades.

#### IV. THE NEW ORIGINALIST THEORY OF LAW: BRIEF CRITICAL REFLECTIONS

The preceding Part offered a formulation of the neo-originalist account of the ultimate criteria or determinants of constitutional law and then sought to bolster the attribution of that formulation to neo-originalists by highlighting, and critiquing, a distinct position that Solum has pressed in many articles and that Barnett has also endorsed, though (in our view) more equivocally. (Still more equivocal, perhaps, are the views of Jack Balkin, another originalist who has famously embraced some version of the interpretation-construction distinction.)<sup>82</sup> This penultimate Part briefly explains why all this matters—how the shift in originalist thinking from a theory of adjudication to a theory of law bears on the larger debate between originalists and their opponents, the nonoriginalists. That explanation emerges from our investigation of a separate question: Insofar as neo-originalism is chiefly committed to a particular thesis concerning the ultimate criteria or determinants of American constitutional law—the view roughly captured by (OL) and (OL')—what arguments do the neo-originalists offer in support of that thesis? That is, what could make it the case that (OL), (OL'), or some close variant is true or correct, and what evidence could its proponents marshal in its support?

As we read the literature, neo-originalist defenses of (OL)—we will drop references to (OL') and its variants henceforth for ease of exposition—

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81. Solum, *supra* note 30, at 461.

82. Some things Balkin says could suggest that he shares the Solum-Barnett view that interpretation delivers semantic meaning and not law. For example, after identifying several uses of the word "meaning," Balkin insists, "Fidelity to 'original meaning' in constitutional interpretation refers only to . . . the semantic content of the words in the clause." JACK M. BALKIN, *LIVING ORIGINALISM* 13 (2011). But he also appears to believe that the semantic content of the constitutional text constitutes the law. This is the charitable interpretation of his repeated assertion that "the text of the Constitution is law," for he surely knows that a text is not itself law, but bears some relation to law—e.g., the text may have been produced to reflect the law, its content may be constitutive of the law, its content may furnish evidence of what the law is, etc. Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 *JERUSALEM REV. LEGAL STUD.* 57, 59 (2013); *see also* BALKIN, *supra*, at 55 ("[T]he text continues in force today because it is law."). In his more careful moments, accordingly, Balkin speaks of "[t]he aspects of meaning that become law." *Id.* at 71. In short, then, we understand Balkin to be closer to the Whittingtonian than the Solumine picture. Most likely, his view is precisely the one we identified as a possibility in Part I: "constitutional interpretation does attempt to discover the Constitution's semantic meaning, and by way of the semantic meaning also its legal meaning, only in consequence of the fact that the text's semantic meaning is its legal meaning—i.e., that the semantic meaning constitutes the law." *See supra* note 15 and accompanying text. What arguments Balkin musters for this view is a complex matter that we hope to address and evaluate in the depth that it requires on a later occasion.

assume one of three basic forms. The three are metaphysical, moral-political, and legal arguments, respectively.<sup>83</sup> Metaphysical arguments for (OL) maintain that (OL) follows inescapably from the nature of something or other. Common, if generally underdeveloped, claims along these lines are that (OL) follows from the nature of interpretation, of constitutions, of written documents, of law, of authority, or of democracy. Moral-political arguments generally maintain: first, that (OL) is the best view of the criteria or determinants of our constitutional law that we can adopt—that is, doing so will promote or realize, better than any alternative, democratic values, rule of law values (like stability and predictability), aggregate human welfare, or the like; and second, that we have the freedom to adopt it—i.e., that there are no metaphysical or legal obstacles to our choosing, and thereby making true, any particular account of the determinants of law. Legal arguments maintain that (OL) is a fundamental legal fact of our system.<sup>84</sup>

It is well beyond the scope of this Article to critique these many and diverse arguments, although one of us has made a start at tackling the job elsewhere.<sup>85</sup> Here, we settle for offering just three thoughts.

First, extant metaphysical arguments for (OL) indicate that neo-originalists systematically underestimate the difficulty of making plausible metaphysical arguments, and that their arguments consequently fall woefully short of making an adequate case. At a minimum, a proponent would have to make the case that facts that all or most observers would count as relevant data could not be satisfactorily explained unless (OL) is conceived as a constitutive, nonoptional part of the relevant phenomenon—e.g., interpretation of written texts, authoritative directives, democratic polity, etc. In other words, the proponent would have to make a convincing case that all apparent instances of the relevant phenomenon that does not involve (OL) count as nongenuine instances of the kind, or at best as only defective or degenerate instances. The key is not only to insist on these claims, but to make these claims on the bases of certain data that everyone involved would concede are the data that need to be explained, and to show that such data could not be accounted for without treating (OL) as constitutive of the relevant phenomenon. And any verdicts that treat some apparent instances of the relevant phenomenon as nongenuine or degenerate instances run great risks of question begging. Given these hurdles, it is unsurprising that the metaphysical arguments have been in marked decline of late. Nonoriginalist legal and constitutional practices (that is, practices

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83. The metaphysical/moral-political distinction is a close cousin to the hard/soft distinction offered in Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

84. Cf. Solum, *supra* note 30, at 460 n.17 (“Within the originalist family of theories, the Constraint Principle is justified in different ways. For example, it could be argued that constraint is required by popular sovereignty (democratic legitimacy), by the nature of the constitution as a written text, by rule-of-law concerns, or by institutional concerns about discretionary power of unelected judges. It can also be argued that constraint is required by legal norms—although this leaves open the possibility that the legal norms should be changed.”).

85. See generally Berman, *supra* note 83.

that by all appearances flout (OL)), not to mention theories of such practices that portray them as uncommitted to (OL), are too common across the globe, and are too prominent within our own experience to make plausible that they are incompatible with the very nature of law, of constitutionalism, of democracy, or any such. Thus Whittington, for one, appears to accept some metaphysically contingent or optional nature of (OL)—which is compatible with moral-political or legal necessity—when he acknowledges that “methods of constitutional interpretation . . . are themselves ultimately a matter of constitutional construction.”<sup>86</sup> We take this to mean that we can, by an act of collective will, choose legal principles or norms that will make it the case that the legal meaning or significance of the constitutional text just is its original semantic meaning, or some alternative set.

Second, there are some compelling reasons to doubt the moral-political arguments for (OL) as well.<sup>87</sup> To begin, if, as the neo-originalists have it, originalism is centrally a theory of the ultimate criteria or determinants of our constitutional law, and not, contrary to the old originalists, merely a theory of adjudication, and if that neo-originalist theory of the criteria or determinants of our constitutional law were conceived not as a true account of the nature of things, but instead as an implication or consequence of some evaluative or pragmatic assessments, then neo-originalists end up abandoning one of their main lines of argument against nonoriginalists. That is, they abandon their argument that nonoriginalists, motivated by wishful thinking, bad faith, or something else just as discreditable, are changing the subject by invoking extralegal considerations to address legal questions.

Moreover, once we acknowledge that arguments of consequence and principle bear on what the determinants of our law are, then all the nonoriginalist arguments that originalists have wanted to treat as out of bounds or irrelevant are back in play. These include arguments like how nonoriginalism is necessary to reach particular legal judgments that the polity is deeply committed to, and about the circumstances in which circumscribed forms of nonoriginalism yield more predictable judicial

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86. Whittington, *supra* note 12, at 127. Although we are not persuaded by this line of thought, it appears to us more defensible than an alternative line that we can also discern in some of Whittington's writings. In some of his earlier writings, Whittington seemed to think that the nature of written documents makes a commitment to (OL) nonoptional. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION chs. 3–4 (1999); Whittington, *supra* note 2; *see also* Barnett, *supra* note 75. But almost immediately after outlining his metaphysical arguments, Whittington says that his originalist conception is “not the only possible conception of the significance of a written text,” and proceeds to discuss some alternative conceptions, thereby undermining his own metaphysical thesis. WHITTINGTON, *supra*, at 61–76.

87. To be clear, metaphysical arguments and moral-political arguments are not meant to be completely mutually exclusive. Some could argue that (OL) is constitutive of, and not merely conducive to realization of, some moral or political ideal, such as that of democracy or rule of law. We intend our observation about metaphysical arguments to cover such metaphysical moral-political arguments. Our observations in the current paragraph in the text are meant to cover nonconstitutive moral-political arguments for (OL).

decisionmaking than does strong originalism. That is, we would have to consider how all the various nonoriginalist accounts of law or legal practice stack up, relative to (OL), on all the evaluative or pragmatic dimensions that plausibly matter. We emphasize both appearances of “all” in the previous sentence: it will not do to measure (OL) against only some fairly extreme “living constitutionalist” accounts; nor will it do to treat some particular dimensions of value (say, stability or predictability) as conclusive.<sup>88</sup> Although we obviously cannot undertake that comparison here, we conclude with one observation: nonoriginalism, by definition, “owns the field.” It could be that (OL) dominates all comers, but it would require a very high degree of optimism, verging on blind faith, to bet on it. It should be readily apparent to all that neo-originalists have so far hardly offered any systematic and compelling arguments—as opposed to fairly bald assertions with some hand waving—as to which principles, values, and/or consequences are worth satisfying or realizing. Nor have they marshaled real empirical evidence to substantiate the hypothesis that adhering to (OL) is really the best means to achieve or satisfy whatever goals or side-constraints are in play. Certainly, they have not offered anything that approximates the standards of contemporary political philosophy and social sciences, respectively.

Finally, we do believe that the correctness or incorrectness of (OL) is a legal matter, and that arguments for or against it should turn on legal considerations, as opposed to metaphysical or moral-political considerations. What is important to notice here is that legal arguments for (OL) are so far highly doubtful at best. A significant glitch in the argumentation has been a defective self-understanding of those who have provided various arguments for (OL). All too often, their arguments have been infected with various metaphysical and moral-political considerations that are at the end of the day irrelevant, ineffective, and liable to sidetrack the debate. It was one of the main goals of a recent companion piece to this Article to encourage the participants in the debate about originalism to realize that the correctness or incorrectness is really a legal matter, and that there is no shortcut provided by metaphysics or moral philosophy.<sup>89</sup> With an increasing realization of that fact, we surmise, the debate about originalism and its competitors will proceed more efficiently and productively. Even if resolution forever eludes us, locating the irresolvable conflicts to precise joints of the theoretical structure would be considerable progress indeed.

## V. AN ILLUSTRATION

In his contribution to this symposium, Solum introduces a hypothetical based on the Third Amendment to highlight the difference between his conception of the role for construction and a competing conception

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88. For similar points, see Greenberg, *Legislation As Communication?*, *supra* note 11, at 230, 252–55.

89. See generally Berman & Toh, *supra* note 29.

pursuant to which construction arises only when an agent sees herself as confronting an interpretive problem.<sup>90</sup> In this final Part, we modify the hypothetical and repurpose it to illustrate the differences among old originalism, mainstream neo-originalism, the Solum-Barnett variation on neo-originalism, and nonoriginalism.

Suppose that, during peacetime but with good reason, Congress sends troops to a residential area. To house the troops, the government requests the consent of area homeowners. Some owners grant consent, others withhold it. Several owners who consented to the quartering of soldiers in their houses are not, however, owner-occupiers: the houses that these owners have offered for the lodging of troops are occupied rental units. Suppose further that many of these renters do not consent to the quartering of soldiers in their rental homes. Accordingly, they file suit in district court arguing that the quartering, without their consent, violates the Third Amendment, which provides that “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”<sup>91</sup> Granting that the original public meaning (and the original intended meaning) of “Owner” in this provision meant *owner*—essentially, one who holds property in fee simple—the plaintiffs nonetheless argue: (i) that the limitation to owners issued from a now-anachronistic ideological bias in favor of the landed classes and against landless laborers—a bias that, among other things, supported the imposition of property qualifications for voting;<sup>92</sup> and also (ii) that the limitation fails to respect the importance our society accords privacy interests in the home, regardless of whether those who live in the home own it.<sup>93</sup> For these reasons, they contend, the law is properly understood, or this provision is properly interpreted, to require that the government secure consent from the renter-occupiers of any house in which they wish to quarter troops. Relying on the text’s original meaning, the government argues that consent is required only from owners and not renters.

How should the court rule? The varied approaches we have canvassed in this Article would resolve that question, more or less, as follows.

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90. Solum, *supra* note 30, at 496–99.

91. U.S. CONST. amend. III.

92. For a general discussion of this historical bias in colonial and revolutionary times, see Donald A. Krueckeberg, *The Grapes of Rent: A History of Renting in a Country of Owners*, 10 HOUSING POL’Y DEBATE 9 (1999).

93. In the one judicial opinion interpreting the Third Amendment that we have discovered, a panel of the Second Circuit credited arguments like these en route to holding “that property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.” *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982); *see also id.* at 968 (Kaufman, J., concurring in part and dissenting in part) (“I reject a literal reading of the Third Amendment, which, on its face, appears to protect only fee simple owners of houses.”). In the discussion in text, though, we are assuming away the existence of this or any other judicial decision arguably on point.

*Old originalism:* Judges should interpret “Owner” in accord with its original meaning, and thus rule against the plaintiff renters, because any other approach facilitates or makes inevitable giving effects to wishful thinking and bad faith on the part of unelected judges.

*Mainstream neo-originalism:* Because constitutional law (in this case of first judicial impression) is fully determined by the original public meaning of the constitutional text, and because the original public meaning of the Third Amendment required consent to peacetime quartering only from owners, it is the law that only the owner’s consent is required, and courts should rule against the plaintiff renters insofar as they should follow the law.

*Solumine New Originalism:* The communicative content of the Third Amendment is, in relevant part, that only the owner’s consent, and not that of renters, is required to authorize peacetime quartering; whether it is also the law that only the owner’s consent, and not that of renters, is required to authorize peacetime quartering depends upon the scope of a judge’s obligation to construct constitutional doctrine that is consistent with the communicative content of the constitutional text, a matter that originalism rightly understood cannot resolve, although it is true that many originalists believe that judges do have such an obligation.

*(Pluralistic) nonoriginalism:* Even assuming that the semantic meaning of the Third Amendment does not require a renter’s consent to peacetime quartering,<sup>94</sup> it remains entirely possible that our constitutional law does require a renter’s consent; what the law does require in this case likely depends upon the interplay of the ultimate legal principles in our constitutional system, which principles most plausibly include regard for human dignity and respect for property and privacy interests, even of persons who do not own their residences.

We believe that the debate over originalism would be advanced by viewing it, more clearly than has been done thus far, as a contest between the views we have labeled *mainstream neo-originalism* and *(pluralistic) nonoriginalism*. We also believe that the latter is the better view—though we cannot, of course, defend that judgment in this Article.<sup>95</sup>

#### CONCLUSION

This Article has advanced three central claims. First, of whatever changes or shifts might be fairly identified in the overall spirit or tenor of originalism in recent years (say, over the past two decades or so), one is a general (but not universal) shift from viewing the task as advising what judges should do when resolving constitutional disputes to developing

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94. It seems to us that this is not entirely a clear-cut matter. See the intriguing discussion of such matters in Soames, *Interpreting Legal Texts*, *supra* note 15, at 410–12 (discussing the matter of whether statutory language of “vegetables” includes tomatoes, which are botanically speaking fruits rather than vegetables). See also John Perry, *Textualism and the Discovery of Rights*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW*, *supra* note 11, at 105.

95. We have taken a first stab at the defense elsewhere. See Berman & Toh, *supra* note 29.



accounts of what determines the contents of true propositions or norms of constitutional law. The new originalist position, in a nutshell, holds that some version of the semantic meaning of the constitutional text comprises or determines the content of the constitutional law. This is a shift of genuine jurisprudential significance.

Second, although it has not been widely recognized by contributors to the originalism literature, the version of originalism that Solum and Barnett have been championing is only a semantic thesis, not a legal one. This version, we believe, is a highly revisionist account of the theory that most originalists have advanced and that most critics have challenged.

Third, the new originalist theory of the determinants of law is neither entailed by the nature of written documents, interpretation, democracy, constitutionalism, etc., nor obviously implicated by any evaluative or pragmatic considerations. Originalists who continue to maintain that courts should follow the original meaning of the constitutional text *because that fixed meaning determines the law* face a steep *legal* mountain ahead that they have yet to climb.